Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. **77-1615**

Paul Cantwell, Glen Howard
and Rozelle Boyd,

Petitioners,

vs.

William H. Hudnut III, Mayor
of Indianapolis, Joyce Brinkman,
George Tintera, Alan Kimbell and
Paula Hart, Members of the Indianap-
olis-Marion County City-County
Council,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners request that a Writ of Certiorari issue to review the judgment of the Court of Appeals entered in the above cause on December 2, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the District Court by a vote of 2-1 is reported at 566 F.2d 30 (7th Cir. 1977). A copy is appended as Appendix I. The District Court's

opinion is reported at 419 F. Supp. 1301 (S.D. Ind. 1976). A copy is appended as Appendix II.

JURISDICTION

The judgment of the Court of Appeals was dated and entered December 2, 1977. A petition for rehearing timely filed by petitioners was denied on February 15, 1978 with Chief Judge Fairchild and Judge Swygert voting to rehear the matter in banc. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

QUESTIONS PRESENTED

Is Equal Protection denied by a franchise in governmental units having general governmental powers which is diluted nearly 40% through the votes of non-residents who are neither taxed nor served by the units?

Is Equal Protection denied where the legislature of a municipal corporation with general governmental powers is controlled in large measure by another legislature containing members elected at-large from a county-wide district having only 60% of its residents located within the limits of the municipal corporation?

Can relief mandated by a denial of Equal Protection be refused because granting it may result in exacerbating another such denial?

STATUTES INVOLVED

Indiana Code (IC) 18-4-1-2(m) (1976) provides:

> (m) A "Special Service District Council" shall be composed of all the members of the city-county council elected from an electoral district consisting of the entire county, provided sixty per cent [60%] or more of the population in the county is encompassed within the territorial limits of said district. Such council shall also consist of any member of the city-county council elected from a single electoral district under IC 1971, 18-4-3-6 with fifty per cent [50%] or more of its population within the territorial limits of said special service district.
>
> Where the population of a special service district is less than sixty per cent [60%] of the entire county at any time, the members elected from the electoral district consisting of the entire county shall cease to be members of the special service district council. Where the population of a portion of a special service district within a single electoral district falls below, or rises above, such fifty per cent [50%], the members shall cease to be, or shall become, respectively, a member of the special service district council. Such special service district council shall also include members who are appointed to fill vacancies in any district from which any special district council member was elected.

IC 18-4-4-5 (1976) provides:

18-4-4-5. Special Service District Council. The Special Service District Council of any Special Service District shall, with respect to such district have exclusive power by ordinance to approve its budget and make appropriations and tax levies required to be made under the provisions of this article. No Special Service District Council shall have authority to originate or separately to adopt any other ordinance. However any ordinance adopted by the City-County Council relating solely or exclusively to a Special Service District shall be suspended and of no effect until separately approved and concurred in by a majority of a Special District Council when, but only when, the Constitution of the United States or the Constitution of the state of Indiana prohibits such ordinance taking effect without such approval.

STATEMENT OF THE CASE INCLUDING BASIS FOR JURISDICTION

Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1343(3) and (4) since violations of 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment were at issue. The petitioners are each residents in and registered voters of the Marion County (Indiana) Police and Fire Special Service Districts. Respondent William Hudnut III is the Mayor of the consolidated government of Indianapolis and Marion County, Indiana. The remaining

respondents are the four members of the Indianapolis-Marion County Council who are elected from the County at large. (App. II, pp. A 58-59.)

Prior to 1969 Indianapolis was a "First Class" city located wholly within Marion County, Indiana and containing slightly more than 60% of the county's residents. In 1969 a form of consolidated government called "Uni-Gov" was begun. Indianapolis was abolished as a separate entity and merged into the Consolidated City of Indianapolis which consists of the then city together with much of the rest of Marion County. The city of Beech Grove and the towns of Lawrence and Speedway are located in the same county but were excluded from Uni-Gov. (IC 18-4-1-2 (1976)) (App. I, p. A 3 and App. II, p. A 47.) Under the Uni-Gov law a combined legislative body called the City-County Council was created. It has 25 members chosen from single-member districts plus four elected from the County at large. Some of the legislative powers of the city and county were combined in the City-County Council. Other significant functions were not consolidated.

Under Uni-Gov, police and fire services within the county were not merged. The residents from outside the old city continued, as before, to be served by the Sheriff and various fire departments. The residents of the former city were served by the same police and fire departments that had served the former city. The latter were organized within the boundaries of the former city under the name of Police and Fire Special Service Districts. IC 18-4-12-6(b) and IC 18-4-12-34(b) (1976).

These districts are separate bodies corporate and while they do not enjoy the power to issue general obligation bonds, the activities of the two special districts are broad. IC 18-4-1-2(1) (1976). (App. II, pp. A 49-50.) Their combined 1976 budget including pensions exceeded $50 million of which $31 million came from local tax levies. (Ibid at A 59.)[1] These funds are expended solely on services within the districts (IC 18-4-3-13 (1976)). Similarly the districts levy no taxes beyond their boundaries. (IC 18-4-5-8 (1976)). (See App. II, pp. A 62-64.)

Each of these districts serving the old city is governed by a separate legislative body called a Special Service District Council, and not by the City-County Council. IC 18-4-1-2(m). The Special District Councils are given the exclusive power to approve the district budgets, appropriations and tax levies. IC 18-4-4-5. They may not adopt or originate any other ordinance unless the federal or state constitution requires such approval. All remaining legislative power for these districts lies with the City-County Council elected from the entire county. Ibid.

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[1] As the district court found, the districts control property, purchase supplies, regulate the members of the police and fire forces and fix compensation for employees. (App. II, p. A 60.) The police force has full police powers. Police and fire officers are provided educational, insurance and pension benefits. Ibid.

Pursuant to IC 18-4-1-2(m) the Special Service District Councils are made up of those single-district councilmen whose districts are at least 50% within the Special Service Districts plus the four councilmen elected from the county at-large if the Special Service Districts contain at least 60% of the county population. Based on the applicable census and districting data the Special District Councils consist of 16 of the 25 single-district councilmen who serve on the City-County Council plus the four councilmen elected from the county at-large. The latter represent both residents (60%) and non-residents (40%)[2].

Certain cities in Marion County were not included in the scheme of consolidation. Like non-residents of the districts who are located within the consolidated city, residents of the "excluded cities" are represented on the Special District Councils by the four councilmen elected from the county at-large. IC 18-4-3-6 (1974 Burns) and 18-4-3-6 (1976). Residents of the special districts have no vote for members of legislative bodies controlling the

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[2] Since the lines of the single member districts are not consistent with those of the Special Service Districts there are residents of the Special Service Districts whose single-district councilman does not sit on the Special District Councils. Conversely some non-residents of these districts are represented on the councils both by the four at-large councilmen and their single-member district councilman. (App. I, pp. A 5-8.)

police or fire affairs of such excluded areas.

The amended complaint raised two central issues. These were (1) the denial of equal protection through dilution resulting from the seating of the councilmen elected from the county at-large on the Special District Councils although 39.2% of their constituents do not reside in the districts, are not subject to tax by the districts at their place of residence and are not served by these districts, and (2) the denial of equal protection resulting from the exercise of legislative control over the Special District Councils by the overall City-County Council which includes the same at-large councilmen.

The District Court granted relief as to both statutes attacked. It found as to IC 18-4-1-2(m) that the special districts enjoyed general governmental powers (App. II, pp. A 59-61, 77-79) and that the plaintiffs' franchise was diluted to the extent of 39.2% in the selection of the at-large councilmen. (App. II, p. A 84-85.) It found the extent of this dilution beyond constitutionally permitted limits under Mahan v. Howell, 410 U.S. 315, 328 (1973) and Swann v. Adams, 385 U.S. 440 (1967). This dilution was found not to effect any rational state policy. Reynolds v. Sims, 377 U.S. 533 (1964). (App. II, pp. A 84-89.) The trial court concluded that the statute limiting the powers of the special service district councils (IC 18-4-4-5) also provided an improper role in district affairs for the at-large councilmen. (Ibid at A 89-91.)

In reversing on the issues presented here by a 2-1 vote (Chief Judge Fairchild dissenting) the Court of Appeals relied on several theories.[3] As a basis for the first theory it granted arguendo that "a state law allowing strangers to participate in the vote for representatives to a local legislative body having general governmental powers over a particular territory would offend the equal protection rights of the resident voters." (App. I, p. A 23-4.) It further agreed with the District Court's conclusion that police and fire protection are general governmental functions. (Ibid)

However, the Court of Appeals concluded that "at most it can be said that only part of the power to exercise" such general governmental functions was delegated to the Special Service Districts while a "substantial part" of this power was delegated to the county-wide government. (Ibid) In fact the Court of Appeals concluded that under the scheme at issue the police and fire powers lay with the county-wide government. The legislature was held to have granted the Special Service District voters "added weight" as to fiscal aspects of the districts without any requirement to do so. (Ibid at 24-25.) There was found to be no need to grant the districts autonomy.

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[3] Petitioners do not raise here a third issue dealing with the confirmation of the Public Safety Director. The district court's denial of relief on this issue was affirmed unanimously.

In reaching these conclusions the Court of Appeals held that "the franchise apportionment cases beginning with Reynolds v. Sims, 377 U.S. 533 (1964) are . . . inapplicable here . . . [since petitioners] complain not that other voters have greater participation or that districts are unequally apportioned, see Hadley v. Junior College District, 397 U.S. 50, 56 (1970), but that other persons are also allowed some participation." (App. I, p. A 28.)

Aside from its refusal to apply Reynolds the Court of Appeals found against petitioners on their dilution theory. It held that non-residents of the districts shared a "community of interests" that justified giving them a franchise. It also concluded that the franchise structure at issue was rationally related to the "need for simplification and unification of metropolitan" government, citing Avery v. Midland County, 390 U.S. 474 (1968). (App. I, pp. A 32-34.) While accepting this rationale, the Court of Appeals did not overturn the District Court's finding of a 40% dilution. It questioned whether the District Court's finding of nearly 40% was "realistic" but concluded only that non-residents of the district have a "relatively minor voice in the election of members of the district councils." (App. I, pp. A 31-32 n. 13.) This "voice" was not quantified.

Lastly, the Court of Appeals noted that if the councilmen elected from the county at-large were excluded from district affairs some district residents who had no single member representative on the Special Service District Councils

would be without representation. This effect, which is a product of districting not of statute, was apparently felt to justify a denial of relief.[4]

Chief Judge Fairchild in dissent found the same system "fraught with unjustified classification of residents of the districts and inequality of representation." (App. I, p. A 41.) Judge Fairchild would have held that the granting of the franchise to an electorate containing 40% non-residents results in a "substantial dilution of the voting power of the residents of the special service districts." (App. I, pp. A 38-39.) As proof of this he noted that in 1975 this expanded electorate seated four councilmen elected from the county at large on the Special Service District Councils who had received only 42% of the vote in the districts. The candidates receiving 58% of the residents' votes were not seated. (Ibid at A 39.)

Judge Fairchild did not find this system permissible under the rubric of a "valid response to the need for flexibility in local government" (Ibid at p. A 43) but rather concluded that:

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[4]Under the statutory scheme here the district boundaries are set by the City-County Council. The districts are to be "compact" and to be wholly within or wholly without the special service district lines "where practicable". IC 18-4-3-8 (1976). The district lines at issue were drawn by the City-County Council after the passage of Uni-Gov. (Ibid.)

"We do not have before us a simple mechanism which could be claimed to afford representation to the overall government in recognition of some relationship it has to the problems and decisions of the special service districts, whatever might be the proper result if that were the case." (Ibid at p. A 41.)

Petitioners sought a rehearing in banc. This was denied on February 15, 1978 with Judges Fairchild and Swygert dissenting.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals for the Seventh Circuit Conflicts with Controlling Decisions of This Court.

Under the decisions of Avery v. Midland County, 390 U.S. 474 (1968) and Hadley v. Junior College District, 397 U.S. 50 (1970) this Court concluded that where units of elected local government having "general governmental powers" are at issue (Avery at 484-5) apportionment must not "deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the . . . district." Hadley at 52. Any failure to meet the norm of "one man, one vote" must be "based on legitimate considerations incident to the effectuation of a rational state policy" (Reynolds v. Sims, 377 U.S. 533 at 579 (1964)) and given such a policy must be within constitutionally allowable limits. Mahan v. Howell, 410 U.S. 315, 328 (1973).

The Court of Appeals specifically rejected the applicability of Reynolds and its progeny on the apparent ground that dilution of the voting franchise is only a relevant inquiry in cases where there is malapportionment or where one class of voters is alleged to have too much participation (App. I, p. A 28.) It concluded that the principles of Reynolds do not apply to the device of dilution through extension of the franchise to voters with no significant interest on the affairs of a political unit enjoying general governmental powers. Thus Reynolds was held inapplicable to cases of overinclusivity.

The rule of Reynolds as applied to local governmental units with general governmental powers in Hadley requires that each vote of a person in the district be given as much weight as that of any other voter to the extent practicable. Hadley supra at 52. The rule, as stated, is not qualified by allowing dilution through the device of allowing non-residents to vote. The Court of Appeals creates such an exception to the rule. If the rules of Hadley and Mahan are applied to the instant facts without this new exception, the structure at issue fails to pass constitutional muster.

The Court of Appeals placed primary reliance on the case of Clark v. Town of Greenburgh, 436 F.2d 770 (2nd Cir. 1971). But as was noted by the trial court (App. II, pp. A 82-83) Clark does not support the position of the Court of Appeals. In Clark a claim of overinclusivity failed where the challenged

franchise extended to voters who paid some taxes and got some services. Here the challenged franchise is given not to taxpayers, residents or recipients of services. No interest rising to the level of that seen in Clark has been shown that would support the extension of the franchise beyond special district boundaries.

If Reynolds applies[5], the complained of statutes must fail. The dilution of nearly 40% found here is 50% greater than that disallowed in Swann v. Adams, 385 U.S. 440 (1967). Aside from the scope of this dilution the District Court and Chief Judge Fairchild in dissent found no rational basis for its existence. The District Court specifically rejected the only two rationales for dilution presented to it. (App. II, pp. A 85-89.) The trial court

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[5]The Court of Appeals apparently would diminish the efficacy of the Equal Protection Clause on the basis that the Indiana legislature granted residents of the Special Service Districts more voting power than necessary. Petitioners' contention, however, is that once the franchise is granted, it must comply with the mandate of the Equal Protection Clause. As this Court said in Hadley, supra at 56:

> [W]henever a state . . . government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election. . . ."

held that the franchise attacked did not contribute to any "flexibility" in solving the problems of local government. Nor was the granting of the franchise to all residents of the county seen to fit with any protection of the interests in the Special Service Districts of those county residents from outside the Special Service Districts who owned property in the districts. (Ibid)

The trial court's conclusion as to "flexibility" was based on the fact that the complained of wrongs were created after Uni-Gov's formation. See Bryant v. Whitcomb, 419 F. Supp. 1290 (S.D. Ind. 1970) and (App. I, pp. A 8-13.)[6] The violations of Equal Protection at issue here could not have contributed to the formation of Uni-Gov as a solution to local government problems. In fact the local government at issue abrogated the complained of role of the at-large councilmen in the course of settling Bryant, an earlier suit attacking Uni-Gov. (Ibid.) The Court of Appeals ignored, but did not overturn, the

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[6]The Court of Appeals also pointed to the fact that debt for capital expenditures in the special services districts are supported by a county-wide tax base. (App. I, pp. A 20-21.) The decision fails to note that since this power does not lie with the Special Districts the interests of non-district residents need no protection there. In fact the bond issues alluded to are voted on by the whole City-County Council in which the interests of non-residents of the Special Service Districts are fully protected.

District Court's conclusion on flexibility. Nor did it disagree with the trial court's rejection of the second suggested rationale--the interests of non-residents owning district property.

In seeking a rationale for a denial of Equal Protection the Court of Appeals justified the 40% dilution largely on the basis of recognition of a "community of interests" in the way of social, political and economic ties between the "districts and the rest of the Uni-Gov territory." (App. I, p. A 23.) This conclusion is in direct conflict with the conclusion of the District Court based upon the record that:

> "In sum, persons inside Marion County, but outside the districts hold no relationship to the districts any different from the relationship of persons living outside Marion County altogether in other parts of Indiana . . ." (App. II, p. A 69.)

The District Court's conclusion which was not overturned by the Court of Appeals was based directly on a stipulation signed by counsel for the respondents which conceded that the common social and economic interests pointed to by the Court of Appeals extended beyond the county boundaries i.e. beyond the Uni-Gov territory. (App. II, pp. A 68-69 and R. following p. 73 at Stipulation para. 21.) There is, therefore, no more "community of interest" basis for extending the Special Service District franchise to Marion County residents than there is to residents in the eight counties surrounding Marion County or, indeed, to residents of the entire state.

If such vague interests can justify the extension of the franchise beyond the Special District boundaries then the franchise of the residents of any local government unit can be eroded by expanding the franchise to "interested" residents of nearby communities. The line could be drawn to fit the political convenience of the draftsman. Thus the purpose of Avery and Hadley would be defeated. Here the "community of interests" rationale has been applied by the legislature in one-direction only. The Special Service District residents are given no say over affairs of the police departments of "excluded" areas within the county. This only makes the effect of dilution greater and belies the claim that community of interests is anything but an after-the-fact rationale for control by "strangers."[7]

As another possible rationale for dilution the Court of Appeals suggests that the device of seating councilmen elected from the county at large "afford[s] representation to nearly 200,000 of the districts' residents who would

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[7] Petitioners recognize the possible propriety of "stranger" voting in the context of adjacent governmental units operating in tandem and sharing some veto power over each other. Cf. Town of Lockport etc. v. Citizens for Community Action etc., 430 U.S. 259 (1977). Here there is no such mutuality - the residents of the special service districts enjoy no control over police and fire service in "excluded cities" outside their districts while residents of those "excluded cities" are given control over special district affairs.

have no representation whatsoever on the special service district councils if only councilmanic districts wholly within the special service districts sat on these councils." (App. I, pp. A 30-31.) There is no support in the statutory scheme for this hypothetical rationale. The district lines at issue were drawn, not by statute, but by the City-County Council after Uni-Gov was effective. IC 18-4-3-8. No one has sought to exclude these 200,000 voters from any franchise. Rather the goal is to maintain the fullness of their franchise together with that of other district residents.

The Court of Appeals, while rejecting both Reynolds and the limits imposed by Mahan and Swann, did note the significance of certain of this Court's earlier opinions. It noted (App. I, pp. A 29-30) that petitioners argument is in effect that the rules of Salyer Land Co. v. Tulare Lake etc., 410 U.S. 719 (1973) and Associated Enterprises v. Toltec Watershed etc., 410 U.S. 743 (1973) and Hadley hold in the converse i.e. that only those benefited and/or burdened by the operations of a government unit having general governmental powers should have the franchise. To hold otherwise is to run the risk of control by non-residents. Under the facts of the present case as was recognized by Chief Judge Fairchild in dissent, the non-residents did not merely get "some voice" they got a voice sufficiently great to control the outcome of the election for members elected by the county at-large who sit on the Special Service District Councils. "Thus one-fifth of the governing bodies represents a point of view contrary to

that of a majority of the voters of the special service districts." (App. I, p. A 39, Fairchild J. dissenting.)

The Court of Appeals despite Mahan and Swann has decided that Equal Protection in the granting of a franchise can be diluted to the extent of 39.2% in favor of non-residents. This decision has no adequate rationale under Reynolds. The decision of the Court of Appeals on the important federal Equal Protection question presented is thus in conflict with the applicable decisions of this Court and should be reversed.

2. This Case Presents the Question of the Propriety of Dilution of the Franchise in the Context of Overinclusivity, an Issue Not Directly Resolved by this Court and of Such Importance as to Require Solution by this Court.

On March 6, 1978, this Court granted review of Holt Civic Club etc. et al. v. City of Tuscaloosa etc. et al. No. 77-515 postponing its consideration of the question of jurisdiction to the hearing of the case on the merits. 46 U.S.L.W. 3555 (1978). Holt deals with an underinclusive franchise in a local governmental system under which the City of Tuscaloosa exerts extraterritorial powers over adjacent non-residents who are not enfranchised in Tuscaloosa elections. It also raises the question of whether the complaining non-residents must seek the Tuscaloosa franchise in order to state a cause of action.

At the heart of the Holt case is the question of the application of the decisions of this court in Hadley supra,

Salyer supra, and Associated Enterprises, supra. These cases when read together hold that the rule of one man - one vote of Reynolds v. Sims, 377 U.S. 533 (1964) and Avery v. Midland County, 390 U.S. 474 (1968) does apply to local governmental units enjoying general governmental powers but not to certain narrow purpose units of government affecting certain "definable groups of constituents more than other constituents. Salyer at 720-21 quoting Avery at 483-4.

The issue of dilution of the principle of one man - one vote has arisen in many forms. In Holt the question is the constitutional propriety of the franchise in a district which affects non-residents through police and sanitary regulations while denying the same non-residents the vote. Cf. Holt Civic Club, etc. et al. v. City of Tuscaloosa etc. et al., 525 F.2d 653 (5th Cir. 1975). Dilution is discussed in Hadley and Salyer where the contention was that some voters had too much weight. Dilution by exclusion of interested residents was the wrong barred in City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) which forbade the exclusion of non-property owners from elections for the approval of the issuance of general obligation bonds. Id. at 213. The present case presents the issue of dilution in the form of overinclusivity. Here non-residents of the Special Service Districts do enjoy a franchise for electing district officials although the district's services and taxes are confined to the districts.

At its heart the issue of dilution is the same whatever its guise. It is submitted that this question can best be examined at the same time whether particular form of dilution is under- or

over-inclusivity. Consideration of Holt and the instant case together would be of real benefit in fixing the parameters of Equal Protection in voting.

Beyond "dilution" there is yet another parallel between the present case and Holt. The Court of Appeals notes in dicta its dissatisfaction with the remedy sought. It observes that since districting has left some Special Service District residents without a single district councilman on the Special District Councils they will have no representation if councilmen elected from the county at-large are excluded from these councils.[8] (App. I, p. A 19.) The dissent while aware of this concern rejected the possibility of exacerbating one wrong as a justification for preserving a second one. (App. I, pp. A 42-43.) In lay terms the Court of Appeals hints that "two wrongs make a right" or at least justify the continuance of the only wrong before the court. This logic should not compel the denial of any relief nor does the Court of Appeals explain why it might.

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[8] At App. I, p A 20, n. 9 the Court of Appeals also voices concern that a ruling for petitioners would result in litigation for the redistricting of single-member districts that contain non-residents. This was not an issue before the court. The existence of this separate wrong is surely no basis for preserving the wrong actually before the Court.

Whether the focus is on dilution or on the appropriate remedy for it, the issues suggested involve important questions of federal law not yet fully settled by the Court.

Conclusion

The decision of the Court of Appeals on the question of overinclusivity is in conflict with this Court's decisions in Reynolds, Salyer and Hadley. There is a real need for guidance on this issue from the Supreme Court lest Equal Protection in local government be eroded. It is respectfully suggested that this Court hear this petition together with Holt or defer ruling on it until after the decision therein.

Respectfully submitted,

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APPENDIX I

[566 F.2d 30]

[Nos. 76-2076 and 76-2077]

PAUL CANTWELL, GLEN HOWARD and ROZELLE BOYD,
Plaintiffs-Appellees,

v.

WILLIAM H. HUDNUT, III, Mayor of Indianapolis; JOYCE BRINKMAN, GEORGE TINTERA, ALAN KIMBELL and PAULA HART, Members of the Indianapolis-Marion County City-County Council,
Defendants-Appellants.

PAUL CANTWELL, GLEN HOWARD and ROZELLE BOYD,
Plaintiffs-Cross-Appellants,

v.

WILLIAM H. HUDNUT, III, Mayor of Indianapolis; JOYCE BRINKMAN, GEORGE TINTERA, ALAN KIMBELL and PAULA HART, Members of the Indianapolis-Marion County City-County Council,
Defendants-Cross-Appellees.

United States Court of Appeals
For the Seventh Circuit

December 2, 1977

Before FAIRCHILD, Chief Judge; TONE and WOOD, Circuit Judges.

TONE, Circuit Judge. Indiana's Uni-Gov statute,[1] unifying the local governments of Indianapolis and Marion County, is challenged in this action as denying certain voters the equal protection guaranteed by the Fourteenth Amendment. The specific statutory provisions under attack allow four city-county councilmen elected at large from the entire Uni-Gov area (a) to sit on the councils of special police and fire districts, the territory of which consists of only part of the Uni-Gov area, (b) to vote at Uni-Gov council meetings on the business of those special districts, and (c) to vote on the issue of the confirmation of the Uni-Gov Director of Public Safety, who is appointed by the Mayor-Chief Executive subject to confirmation by the city-county council and whose principal duties related

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1. The Act's formal designation is the "Consolidated First Class Cities and Counties Act," Chapter 173 of the Acts of 1969, Ind. Code §§ 18-4-1-1 to 18-4-15-2 (1971).

to the special service districts. The District Court held that (a) and (b) but not (c) denied equal protection to the plaintiffs, who are voters of the special service districts. 419 F. Supp. 1301 (S.D. Ind. 1976). We hold all three provisions valid and therefore reverse in part and affirm in part.

I.

The Uni-Gov statute consolidates the local governments of the City of Indianapolis and surrounding Marion County. The statute creates special police and fire service districts, each of which consists essentially of the area of the old City of Indianapolis, but leaves police and fire services in certain cities in the county which are excluded from the new consolidated government to the police and fire departments of those cities and in the rest of the county to the sheriff. The city-county government has extensive power over the police and fire special

service districts. In the words of the District Court,

> "The Act as amended ties the special service districts into the county-wide administrative structure. Thus, (1) the Police and Fire Special Service Districts are under the authority of the Department of Public Safety, IC 18-4-12-1 et seq. (2) The same department is responsible for weights and measures, civil defense and the dog pound. IC 18-4-12-2. (3) The mayor appoints a Director of Public Safety subject to approval by a majority of the entire City-County Council. IC 18-4-3-4. (4) The budgets for the districts are prepared by the Director. IC 18-4-12-11 and 18-4-12-37. (5) Upon the approval or modification thereof by the special councils, the budget is subject to a veto by the mayor of the consoliated city-county (IC 18-4-5-2(c)) who is elected by the voters of the entire county,

> not just the special service districts (IC 18-4-3-1). (6) Beyond the limited legislative powers of the districts, their legislative affairs are controlled by the entire City-County Council including both the at-large councilmen as well as single-district councilmen from outside the districts." 419 F. Supp. at 1307.

The special service districts have their own councils made up of 20 of the 29 city-county councilmen. Those councils have power to levy taxes and make appropriations for the districts and to approve the budgets for the districts, which are prepared by the Director of Public Safety (and which are ultimately subject to veto by the Mayor-Chief Executive of the city-council government).

Of the 29 members of the city-county council, one is elected from each of the 25 councilmanic districts and four are elected from the county at

large.[2] (Ind. Code § 18-4-3-6.) The 25 districts are substantially equal in population[3] and no question is raised concerning their configuration or equality of population among them.

The 20 councilmen who serve on each special service district council include the four elected at large, whose participation as members of those councils and in special service district matters before the city-county council is challenged, and 16 others, who are elected from councilmanic districts having at least 60 percent of

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2. The city-county council replaced a nine-member council elected at large from six councilmanic districts, with each political party entitled to one nominee from each district. At the general election each voter could cast a vote for nine persons, and the nine having the highest number of votes were elected members. (Ind. Code § 18-2-8-1 to 3.)

3. Population varies not more than one percent above or below the norm, based on 1970 Census Data.

their populations living within those districts. Nine of these are wholly within. The other seven are partly within and partly without:

Councilmanic District	Residents' Location Within	Outside
5	28,666	1,967
7	28,276	3,248
8	27,508	1,743
12	20,096	8,145
14	25,622	5,849
17	29,307	1,127
20	20,545	9,744
Totals	180,020	31,823

Three councilmanic districts are partly within and partly without the special service districts but are not represented on the latter districts' councils, because less than 60 percent of their populations are within the latter districts:

Councilmanic District	Residents' Location Within	Outside
3	5,357	26,572
4	3,572	28,273
24	5,486	26,202
Totals	14,415	81,047

The 14,415 residents of these three councilmanic districts who reside within the special service districts are represented in the special service district councils only by the councilmen-at-large. The remaining residents of the special service districts are of course represented on the special service district councils both by the councilmen from their own councilmanic districts and by the councilmen-at-large.[4]

II.

Litigation concerning the special service districts began shortly after the passage of Uni-Gov in 1969. In Bryant v. Whitcomb, 419 F. Supp. 1290 (S.D. Ind. 1970), in which the court

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4. Regardless of where a councilman or his constituents reside, he, of course, represents all of his constituents, residents as well as non residents of the special service districts. Cf. Dallas County v. Reese, 421 U.S. 477 (1975); Dusch v. Davis, 387 U.S. 112, 115-117 (1967).

rejected a contention that the entire Uni-Gov plan was a form of racial gerrymandering, the composition of the special service district councils was also challenged. At that time the statute was unclear as to whether councilmen elected at large were to sit on the councils:

> "A 'Special Service District Council' shall be comprised of members of the City-County Council elected from all those districts which encompass any part of a Special Service District."

Id. at 1296-1297. Noting that this provision could be construed to allow councilmen-at-large to sit on the district councils, inasmuch as their constituencies included the residents of the districts, the District Court neverthless declined to adopt that construction, on the ground that it "would raise serious constitutional issues since approximately forty percent of the voters for such

councilmen will reside outside the special service districts." Id. at 1297.

The statute also gave the special service district councils "exclusive power by ordinance to approve [their] budget[s] and make appropriations and tax levies required to be made under applicable law therefor; and that shall be [their] sole function." Id. The court noted that this limitation of the district councils' power left "the entire residue of legislative authority over important special service district functions" in the hands of city-county council. It also noted that the projected composition of the city-county council was such that councilmen representing non-district residents could overrule "the vote of a substantial majority of the councilmen actually representing the voters and citizens of the special service districts, including those constituting [a] cognizable, racial minority." Id. at 1298. Because the statutory

limitation on the special service district councils' authority allowed representatives elected in part by nonresidents of the districts to vote on matters that concerned the districts alone, the court held that limitation to be an unconstitutional dilution of the voting rights of the districts' residents. Id.

The court abstained from ruling on the severability of this provision from the rest of the statutory scheme and withheld further action to allow time for the effect of the limitation found to be invalid to be "nullified by the state courts . . . or by local or legislative action," thus bringing the Act in conformity with "constitutional standards on this point." Id. Shortly thereafter, the city-county council passed an ordinance providing that police and fire district councils could propose ordinances on all legislative matters concerning the districts and that only councilmen representing constituencies within the districts

could vote on those proposals when they were brought before the city-county council. On the basis of this ordinance, the court entered judgment for the defendants.

In 1971 the Indiana legislature abrogated the ordinance by adopting a variation of the original plan, specifically including on the special service district councils both councilmen-at-large and councilmen elected in councilmanic districts in which more than 60 percent of the population is within the special service districts. The amendment also limited the powers of the special service district councils, as before, to fiscal matters.[5]

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5. The amendment provided in pertinent part as follows:

> "A 'Special Service District Council' shall be composed of all the members of the City-County Council elected from an electoral district consisting of the entire County, provided sixty per cent [60%] or more of the population in the county is encompassed within the territorial

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> limits of said District. Such council shall also consist of any member of the city-county council elected from a single electoral district . . . with fifty per cent [50%] or more of its population within the territorial limits of said special service district."

Acts 1971, P. L. 258, § 1, Ind. Code § 18-4-1-2(m).

> "The special service district council of any special service district shall, with respect to such district have exclusive power by ordinance to approve its budget and make appropriations and tax levies required to be made under the provisions of this article [Ind. Code §§ 18-4-1-1 to 18-4-24-25.] No special service district council shall have authority to originate or separately to adopt any other ordinance. However any ordinance adopted by the city-county council relating solely or exclusively to a special service district shall be suspended and of no effect until separately approved and concurred in by a majority of a special service district council when, but only when, the Constitution of the United States or

This action was then filed against the Mayor-Chief Executive of the consolidated city-county government, the four councilmen elected at large, and the seven councilmen from those councilmanic districts with more than 60 percent of their populations within the special service districts. Plaintiffs asserted that their votes as residents of the special service districts were unconstitutionally diluted by the participation of those councilmen as members of the special service district councils, in special district matters before the city-county council, and in the confirmation of the Director of Public Safety, and sought an injunction

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> the constitution of the state of Indiana prohibits such ordinance taking effect without such approval."

Acts 1971, P. L. 258, § 6 Ind. Code § 18-4-4-5.

against such participation. They also sought an injunction "prohibiting defendants from in any way limiting the legislative power of the special service district councils." The seven councilmen from split councilmanic districts were later dismissed out and the contentions as to them abandoned. The case was assigned to the same district judge. Adhering to the position he had announced earlier, he held unconstitutional the statutory provisions allowing the councilmen-at-large to sit on the special service district councils and to vote in the city-county council on special district matters. Id. at 1313. He reached the opposite conclusion, however, on the issue of the confirmation of the Director of Public Safety. See Part V, infra. These rulings are the subject of the appeal and cross appeal.

On the issue of the limitations on the powers of the districts, the District Court's judgment granted no relief other than limiting the powers

of the councilmen-at-large. It is therefore unnecessary, as plaintiffs correctly state, to rule on the defendants' arguments on this point, which appear to be addressed to contentions made by plaintiffs in the District Court and to some expressions in that court's opinion rather than its judgment. See 419 F. Supp. at 1306, 1309, 1313-1314. No issue relating to the limitations on the powers of the special service districts is before us.

Plaintiffs do not contend that the challenged statute dilutes the votes of a racial minority, the earlier claim to that effect in Bryant having been based on Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969), which was reversed in Whitcomb v. Chavis, 403 U.S. 124 (1971).[6] Nor do plaintiffs

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6. In that case the District Court's order, which the Supreme Court reversed, would have required reapportionment of the state's legislative districts to eliminate Marion County's multi-member district, on the ground that the multi-member device operated to dilute or cancel the voting strength of an identifiable racial group.

question the apportionment of the councilmanic districts.

III.

The interests of three groups are involved in the Indiana legislature's allocation of governmental authority with respect to the special service districts: (1) Residents of the six councilmanic districts wholly within the special service districts. (2) Residents of the special service districts living in councilmanic districts which lie partly within and partly without the special service districts. (3) Residents of the county outside the special service districts. The first group does not require further attention at this point, but the other two do.

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A.

The four councilmen-at-large are in essentially the same situation, so far as the issues in this case are concerned, as the seven councilmen elected from the split councilmanic districts with more than 60 percent of their populations within the special service districts.[7] A majority of the constituents of each of these councilmen reside inside the special service districts and a minority without.[8]

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7. Plaintiffs' counsel acknowledged as much in oral argument before us and, in fact, as we have noted, the original complaint challenged the participation of these seven councilmen. Plaintiffs abandoned that part of their claim, as their counsel explained in oral argument, not because it was based on a different legal theory, but because the remedy it required, redistricting, would unnecessarily complicate and prolong the proceedings.

8. Over 60 percent of the constituents of the councilmen-at-large are residents of the special service districts, including the 14,415 whose only representation is through the four councilmen-at-large. Defendants

More important for present purposes, if the four councilmen-at-large were excluded from participation in special service district matters, 14,415 of their constituents living in those districts (in split councilmanic districts 3, 4, and 24) would be disenfranchised as to those matters; and if the seven were also excluded from participation in special service district matters, their 180,020 constituents within the districts would likewise be disenfranchised as to those matters. Thus, if these two categories of councilmen could not participate

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point out that if the registered voters who live in the special service districts had turned out in the same proportion as those outside the districts, the political party that won the majority of votes within the districts could have won the four at-large seats, assuming the same proportion of votes for that party if more persons had voted.

in special service district matters, extensive redistricting would be required in order to afford representation to all persons who live in the special service districts.[9]

B.

The county residents living outside the special service districts comprise about 40 percent of the county's population. Perhaps their most easily identifiable interest

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9. A holding with respect to the four will apply to the seven not only theoretically but, in all probability, practically. Nothing will prevent other residents of the nine councilmanic districts that are wholly within the special service districts, or the present plaintiffs if they are so inclined, from bringing an action to declare the participation of the seven unconstitutional. The decision here would be controlling in such a case. In reality, therefore, the seats of eleven of the twenty members of the special service councils are at stake.

arises from the absence of any separate debt capacity in the special service districts: Expenditures on behalf of the districts for facilities and equipment which are not paid from current funds must be financed through obligations payable from taxes collected countywide. Taxpayers who participate in paying for capital expenditures have an interest in how facilities and equipment are used.

Other interests of the nonresidents are less direct. Although the districts levy taxes only on property within their boundaries,[10] between 60 and 70 percent of that property, measured in terms of assessed valuation, is owned directly or indirectly by residents of the county who live

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10. The District Court noted:

> "Within Marion County there are 49 tax rates applied to 83 different geographical areas. No property taxes are (or could lawfully be) collected by the special service districts on property located outside these districts." 419 F.Supp. at 1307

outside the districts.[11] Because the special service districts contain the seat of the county-city government, places of employment, shopping centers, hospitals, and other public facilities, nonresidents have an interest in police and fire protection within the districts which is of a magnitude lesser than the interest of district residents but greater than that of those who live further away and do not rely on the facilities of the district. Thus, for example, over 70 percent of the county's workers who live outside the districts have their places of employment within

11. This figure includes apartment buildings, whose owners presumably pass on the tax costs to their tenants. This passing-on effect dilutes the significance of defendants' assertion that the residents of the districts pay directly only 9.37 percent and 12.6 percent of the taxes to support the districts' budgets. Cf. City of Phoenix v. Kolodziejski, 399 U.S. 204, 210-211 (1970).

them.[12] Accordingly, as a result of the economic and social, as well as political, interrelationships between the districts and the rest of the Uni-Gov territory, all residents of the county share a community of interests in the proper operation of the police and fire districts as well as the city-county government of which they are a part.

IV.

A.

Although there are no decisions on the point, we shall assume the correctness of the District Court's view that a state law allowing strangers to participate in the vote for representatives to a local legislative body having general governmental powers over a particular territory would offend the

12. This figure is based on an estimate (72.2 percent) by a representative of the Bureau of the Census in a letter to the Mayor-Chief Executive, William H. Hudnut, dated January 19, 1976.

equal protection rights of the resident voters in that territory. Our difficulty with applying that proposition here is that it does not fit the facts. Although police and fire protection are certainly general governmental functions, at most it can be said that only part of the power to exercise those functions is delegated to the special service districts; a substantial part of that power is delegated to the county-wide government; and the exercises of the police and fire protection powers within the districts by the county-wide and district governmental units are interrelated and interdependent. Indeed, it is more accurate to say that the Indiana legislature delegated the police and fire protection functions in the districts to the city-county government, which it plainly had the right to do, except for certain fiscal responsibilities, which it elected to delegate to the district councils in order to give the votes of the residents of the districts

added weight with respect to the fiscal aspects of the districts' affairs.

We know of no requirement that the legislature give the votes of the districts' residents that added weight. If the police and fire functions had been left entirely with the city-county government, the districts' residents would have had no grounds for complaint except, perhaps, that taxes levied outside the districts should bear a part of the cost of police and fire protection within the districts. Such a claim is not before us. The question is whether Indiana, having elected to give some added voice to citizens particularly affected by particular governmental functions, must give them autonomy with respect to those functions.

An argument similar to that advanced by plaintiffs here was made to the Second Circuit in Clark v. Town of Greenburgh, 436 F.2d 770 (1971), in which the "town," comparable to the county here, included six incorporated

villages and an unincorporated area. The plaintiffs were residents of the unincorporated area, which had only 47 percent of the town's population but was the source of 95 percent of the town's property taxes and received 95 percent of the town's services. They argued that their votes were unconstitutionally diluted when residents of the incorporated villages were allowed to vote in town elections:

> "They argue that since a state may not dilute their vote by maintaining election districts of unequal population, Reynolds v. Sims, 377 U.S. 533 . . . a state may not dilute their vote by granting the vote to persons having 'no substantial interest in and deriving no substantial benefit from' the Town government." Id. at 772 (quoting from plaintiffs' brief).

The Court rejected the plaintiffs' argument, finding the village residents' interest in the town, government

sufficient, not only to allow, but to compel, the state to accord them the franchise. The Court also said:

> "That the village residents may have less interest in Town elections than the residents of the unincorporated area does not 'dilute' the votes of the latter group; if anything, their votes are thereby strengthened since the less interested group will be less likely to vote. More fundamentally, voter 'interest' in this sense will always vary from group to group and issue to issue, but this does not 'dilute' the vote of any group in the constitutional sense. It is true that the Supreme Court has intimated that in some specialized instances the 'one-man-one-vote' rationale may not apply, thereby perhaps allowing the exclusion of some class of voters. But this would hardly help these plaintiffs, who rely on the 'one-man-one-vote'

analogy for their main constitutional argument." Id. at 772. Cf. also Rutledge v. Virginia, 330 F. Supp. 336 (W.D. La. 1971); see also Glisson v. Mayor and Councilmen of Town of Savannah Beach, 346 F.2d 135, 137 (5th Cir. 1965).

The franchise apportionment cases beginning with Reynolds v. Sims, 377 U.S. 533 (1964), are as inapplicable here as they were in Clark v. Town of Greenburgh. Plaintiffs here, like the plaintiffs in that case, complain not that other voters have greater participation or that districts are unequally apportioned, see Hadley v. Junior College District, 397 U.S. 50, 56 (1970), but that other persons are also allowed some participation.

B.

Alternatively, even if we were to view the problem before us as a dilution of plaintiffs' votes rather than simply a delegation of governmental functions within a local government

with undisputed power over those functions, we would not find the action of the Indiana legislature violative of equal protection. Although Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), and Associated Enterpises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973), involved special purpose political units and on plaintiffs' theory are inapplicable here for that reason, plaintiffs are in reality attempting to apply the principle of those cases in reverse. Those cases permitted the franchise to be limited to the class of voters primarily burdened and benefited by the activity of the political unit. Plaintiffs argue that they and others in their position are the only ones burdened and benefited and therefore only they should have the franchise. Even assuming that this reverse twist on Salyer and Associated Enterprises should be accepted as a principle of constitutional law, its applicability

here would depend upon whether the residents of the county outside the districts, whose inclusion in the franchise arguably dilutes the votes of the districts' residents, lack any interests which would justify allowing them some participation in the election of representatives whose responsibilities include special service district affairs. Cf. Lockport v. Citizens for Community Action, 430 U.S. 259, 271 (1977).

Here those residents have interests both as residents of the city-county area whose government is responsible to a large extent for the performance of the police and fire functions in the districts and as sharers to some extent in the burdens and benefits of that police and fire protection. Indiana was justified in recognizing those interests and at the same time affording representation to nearly 200,000 of the districts' residents who would have no representation whatsoever on the special service district

councils if only councilmanic districts wholly within the special service districts sat on those councils. The problem of the appropriate weight to be given the various interests in allocating the franchise is not susceptible of precise mathematical solution.[13] The

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13. The magnitude of the "dilution" depends on the point of view. Focusing on the four councilmen-at-large, the District Court accepted the plaintiffs' view that it is approximately 40 percent, because that proportion of the constituents of the councilmen-at-large live outside the districts. 419 F.Supp. at 1309. Defendants argue that the correct figure is 8 percent, because the four councilmen-at-large constitute only 20 percent of the membership of the special district councils (40% x 20% = 8%). We think the latter approach is somewhat more realistic. Plaintiffs' approach not only ignores the fact that 60 percent of the constitutents of the councilmen-at-large are residents of the special service districts but gives no weight to the ratio of councilmen-at-large to other special service district council members. Thus that approach would show a 40 percent dilution if only one of the 20 special service councilmen were elected at large and the other 19 were elected

Supreme Court has recognized the need for flexibility in local government. In Avery v. Midland County, 390 U.S. 474, 485 (1968), the Court said:

> "This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. . . .

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entirely within the districts. On the other hand, neither approach takes account of the minorities outside the special service districts who vote for the seven councilmen from split councilmanic districts who sit on the special service district councils. Either approach, in our view is of limited value. It is enough to say that Uni-Gov residents outside the special service districts have been given a relatively minor voice in the election of members of the district councils.

> "The Sailors [Sailors v. Board of Education, 387 U.S. 105 (1967)] and Dusch [Dusch v. Davis, 387 U.S. 112 (1967)] cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called 'the emergence of a new ideology and structure of public bodies, equipped with new capacities and motivations. . . .' R. Wood, 1400 Governments, at 175 (1961)."[14]

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14. The Court goes on to say:

> "Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." 390 U.S. at 485-486.

That ground rule is not violated by the provisions attacked in the case at bar.

The passage in Professor Wood's book referred to by the Court has reference to the need for simplification and unification of metropolitan governmental units, whose balkanized structures prevent planning and social progress in urban areas. This is the kind of problem Indiana has attempted to solve with Uni-Gov.

The allocation of the franchise of which plaintiffs complain is a reasonable accommodation of the various interests involved. Uni-Gov is a comlex experiment devised to solve difficult problems of local government. It necessarily contains many interdependent parts designed to give recognition to various interests and needs and to serve the community of interests of all the residents of the urban area. Among those interdependent parts are the location of councilmanic district boundaries, the allocation of responsibilities between the city-county council and the special service district councils, and the assignment of councilmen to the district councils. We find no

constitutional bar to the solution Indiana has chosen, inasmuch as that solution was not invidiously discriminatory, cf. Lockport v. Citizens for Community Action, supra, 430 U.S. at 268, and was rationally related to the furtherance of a legitimate state policy.[15] The injunctive order that would exclude the councilmen-at-large from serving on the special service district councils or participating in matters pertaining to the districts that come before the city-county council is reversed.

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15. The proper test when the plaintiffs complain of dilution of their votes for local government representatives is not strict scrutiny (as in a case of total denial, Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)) but whether the dilution is reasonable in extent and necessary to further a permissible state policy. Mahan v. Howell, 410 U.S. 315, 321-323, 325, 326 (1973); Abate v. Mundt, 403 U.S. 182 (1971); Swann v. Adams, 385 U.S. 440 (1967).

V.

The Director of Public Safety is appointed by the Mayor-Chief Executive of Uni-Gov subject to the approval of the city-county council. The Director is responsible for supervising the special service districts, coordinating "the activities of the department [of Public Safety] with the sheriff and the coroner of the county," and the other county-wide responsibilities described above. (Ind. Code § 18-4-12-5.)

Plaintiffs argue, in support of their cross appeal, that an unconstitutional dilution of their voting power results from allowing the councilmen-at-large to vote on the confirmation of the Director. The District Court rejected that claim on the authority of Sailors v. Board of Education, supra, 387 U.S. at 108, because the Director is a non-legislative officer. We agree, noting that our holding in Part IV, above, would require the same result apart from the principle stated in Sailors.

Plaintiffs argue, however, that the District Court erred in not

applying the rule of collateral estoppel on this issue, which would have bound defendants by the court's earlier, contrary ruling in Bryant v. Whitcomb, from which defendants did not appeal. The ruling in Bryant on which plaintiffs rely was interlocutory, however. The court entered final judgment in favor of the defendants, not plaintiffs, after a city ordinance had been passed incorporating the court's suggested changes. The interlocutory ruling was not itself appealable, and it was mooted by the subsequent events. We therefore affirm the District Court's judgment insofar as it denies plaintiffs' claim with respect to the confirmation of the Director of Public Safety.

REVERSED IN PART, AFFIRMED IN PART.

FAIRCHILD, Chief Judge, dissenting in part. The Legislature has placed the residents of the special service districts in at least three different classes for the purpose of selecting the governing bodies for the districts.

One class (which I will designate A) consists of residents of councilmanic districts wholly within the coterminous special service districts. Each member of Class A has a voice, equal with every other resident of his councilmanic district, in selecting one member (1/20) of the governing bodies. The voice of a member of Class A in this selection is not subject to any dilution by sharing it with residents of an area outside the special service districts, and thus not having the same interest in its affairs.

A member of Class A also has a voice in selecting an additional four members (1/5) of the governing bodies, but he shares this voice with all other residents of Marion County. Although he and his fellow residents of the special service districts comprise 60% of that electorate, it seems clear to me that the 40% who do not reside in the special service districts, and who thus do not have the same interest in its affairs, produce a substantial

dilution of the voting power of the residents of the special service districts.

The impact of this dilution is dramatically illustrated by the 1975 election returns. In the election for the four councilmen at large, the four candidates who received approximately 58% of the vote in the special service districts were not elected because they lost the other areas of the county by a larger margin than they carried the special service districts. Thus one-fifth of the governing bodies represents a point of view contrary to that of a majority of the voters of the special service districts.

A second class of residents of the special service districts (which I will designate B) consists of residents of councilmanic districts partly outside the special service districts, but with 50% of their residents within. Each member of Class B has a voice equal with every other resident of his councilmanic district, in selecting one member (1/20) of the governing bodies. He shares that

voice, however, with residents of an area outside the special service districts and thus not having the same interest in its affairs. Because of this dilution, members of Class B have a presumably less effective voice in the election of their respective members of the governing body elected by districts than do members of Class A. A member of Class B also has a voice in selecting the additional four members-at-large. In this respect his voice is equal to that of each member of Class A and C, but subject to the same dilution.

A third class of residents of the special service districts (which I will designate C) consists of residents of councilmanic districts partly outside the special service districts, and with less than 50% of their residents within. Although a member of Class C has a voice in selecting one member of the council of Uni-gov, that member does not sit on the governing bodies of the special service districts. Thus a member of Class C has no voice corresponding to the voice of members of Class A and B

in electing a member of the governing bodies from a councilmanic district. A member of Class C does have a voice in selecting the four members at large. In this respect his voice is equal to that of each member of Class A and B, but subject to the same dilution.

Clearly the system of selection of the governing bodies of the special service districts is fraught with unjustified classification of residents of the districts and inequality of representation. We do not have before us a simple mechanism which could be claimed to afford representation to the overall government in recognition of some relationship it has to the problems and decisions of the special service districts, whatever might be the proper result if that were the case.

The three plaintiffs are shown to be residents of the special service districts. The record does not show whether they are members of Class A, B, or C. In the present posture of the case the challenge is directed solely

at the participation of the four members at large in the governing bodies of the special service districts. If the plaintiffs are all members of Class A, there could well be argument as to their standing to challenge the structure from the point of view of a member of Class B or C.

Moreover, one of the problems inherent in the relief granted by the district court, excluding the four councilmen-at-large from the governing bodies of the special service districts, is that it destroys any possible voice on those boards of members of Class C. Arguably affirmance of that relief would be inappropriate because it exacerbates one problem while seemingly correcting another. The various aspects of inequality of the system are so interdependent that if a court is to deal with any, it arguably must deal with all.

In any event, since the system denies equal protection in several aspects, I am unable to join in validating the system upon the principle that

the council member-at-large device is a recognition and reasonable accommodation of the interests of residents of the overall municipality in the affairs of the special service districts, or a valid response to the need for flexibility in local government.

A true Copy:
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APPENDIX II

[419 F. Supp. 1301]

PAUL CANTWELL et al.,
Plaintiffs,

v.

WILLIAM H. HUDNUT, III,
MAYOR OF INDIANAPOLIS, et al.,
Defendants.

Civ. A. No. IP 75-721-C

United States District Court,
S. D. Indiana,
Indianapolis Division.

Sept. 9, 1976.

FINDINGS OF FACT, CONCLUSIONS OF LAW

THE COURT FINDS AND CONCLUDES AS FOLLOWS:

STECKLER, Chief Judge.

1. The Historical Background

[1] 1. This litigation relates to the constitutionality of the provisions of the "Consolidated First-Class Cities and Counties Act" IC 18-4-1-1 et seq. commonly referred to as "The Uni-Gov

Act"[1] dealing with the composition of the "special service district" councils. The pertinent parts of the Act took

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1. This action for declaratory and injunctive relief relating to equal protection in local Marion County, Indiana elections was filed on December 16, 1975. Defendants answered on January 13, 1976. Defendants moved to strike portions of the complaint. Plaintiffs then consented on January 20, 1976 to the dismissal without prejudice of such portions of the complaint. On February 2, 1976 plaintiffs answered certain interrogatories clarifying the relief sought. On March 9, 1976 the parties filed a stipulation as to facts which "may be accepted as if the same were established by competent proof upon the trial of this cause" subject to objection on the ground of relevancy. At the oral argument held herein the parties further stipulated that the last sentence of Stipulation No. 20 be amended to reflect that in March 1976 Exhibit Y thereto was approved by the Mayor and became an Ordinance. [References to "Stipulation" are to a stipulation evidenced by all parties to this action.] No objections were made to the facts established by stipulation. No other evidence was presented.

Briefing was completed on May 19, 1976 and oral argument was heard on June 28, 1976.

effect on June 30, 1969 and January 1, 1970. IC 18-4-15-2. Both prior to and after the passage of Uni-Gov the City

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(Footnote continued from preceding page.)

In addition to all the evidence and the argument the court pursuant to agreement and/or its inherent power took judicial notice of the following:

(a) the acts of the Indiana General Assembly which provided for the government of Marion County, and all units of government within Marion County before Chapter 173 of the Acts of the Indiana General Assembly for the year 1969, and of that act and of all such subsequent acts;
(b) published United States Census Bureau data and material; and
(c) the Municipal Code of the City of Indianapolis; the ordinances, resolutions and minutes of the City-County Council and of the Police Special Service District and the Fire Special Service District.
(d) Its opinion rendered February 3, 1970, in Bryant, et al v. Whitcomb, et al, No. IP 69-C-115, and of the final judgment in said cause entered March 6, 1970, and of City-County General Ordinance No. 48, all of which are attached to Plaintiffs' complaint as exhibits in this cause.

of Indianapolis was wholly within Marion County, Indiana. The city residents totalled somewhat more than 60% of the population of the county. It was the only "First Class" city in the State. Like most other American cities, however, it was within a County which had powers of its own. Pursuant to the Uni-Gov Act, the then City of Indianapolis was abolished as a separate entity and merged into the Consolidated City of Indianapolis which consists of the then City together with the rest of Marion County. See IC 18-4-1-3. The other large local units, the City of Beech Grove and the towns of Lawrence and Speedway, were excluded from the consolidation and retained their own separate local governments.[2] The

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2. Since this Act relates to only one locality and is not of state-wide application there is no need for a three-judge panel. For further background on Uni-Gov and the special service districts at issue here see "Special Service Districts in a City-County Consolidation. Conflict between

Uni-Gov Act provided for a mayor to be elected county-wide and a city county council of 29 members, 25 from single member districts and 4 to be elected from the county at-large.

2. Uni-Gov did not provide for a complete consolidation of metropolitan government. Although the right to participate in the election of the mayor of Indianapolis was extended to all residents of Marion County, certain other services were left as before. Notable among these were police and fire services which continued to be performed by the Indianapolis police and fire departments for the area that used to be the City and by the Marion County Sheriff and various fire departments for the remainder of the county. The area of the police and fire special service districts could be extended by the

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(Footnote continued from preceding page.)

Metropolitan Reform and 'One-Man One-Vote' in Indianapolis--Marion County." 47 Ind.L.J. 101 (1971).

City-County Council and some insignificant areas have been added.

3. The Uni-Gov Act specifies two "special service districts" at issue here.[3] The first is the Police Special Service District which was set up with boundaries coterminous with that of the now-dissolved City of Indianapolis. IC 18-4-12-6(b). The Fire Special Service District was set up at the same time and with the same boundaries. IC 18-4-12-34(b). Provision was made for future expansion of the boundaries of these districts. IC 18-4-12-8 and IC 18-4-12-36. Special Service Districts are defined by the act as having the "purpose of providing the property owners therein with a service or services." IC 18-4-1-2(1) and 18-4-15.5-1(p). The districts are separate bodies corporate without the

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3. No issue is presented here as to other far more limited governmental institutions such as the Solid Waste Special Service District. IC 19-2-14.5-1 et seq.

power to issue general obligation bonds. IC 18-4-1-2(1). These districts provide police and fire service for the area of the former city.

4. The Act sets up a legislative body, or "council", for each special service district. As originally enacted in 1969 it provided that the members were to come from the combined city-county council as follows:

> "A 'Special Service District Council' shall be comprised of the members of the City-County Council elected from all those districts which encompass any part of a Special Service District" Acts 1969, ch. 173, § 102(m).

In 1970 this Court entered its judgment in Bryant v. Whitcomb, which observed, inter alia, that the statute as it read was ambiguous as to whether the at-large members of the city-county council were to sit on the special service district councils. Since their presence would raise serious constitutional issues, the court construed § 102(m) not to permit the

at-large council members to sit on the special service district councils. The City-Council's response to the Bryant opinion came in the form of Ordinance No. 48 [Indianapolis Code § 2-84 now repealed].

5. In 1971, after Ordinance 48, § 102(m) was amended by Acts 1971, P.L. 258, § 1, to read as follows:

> [18-4-1-2(m)]. A "Special Service District Council" shall be composed of all the members of the City-County Council elected from an electoral district consisting of the entire County, provided sixty per cent [60%] or more of the population in the county is encompassed within the territorial limits of said District. Such council shall also consist of any member of the city-county council elected from a single electoral district under [IC 1971] 18-4-3-6 with fifty per cent [50%] or more of its population within the territorial limits of said special service district.

> Where the population of a special service district is less than sixty per cent [60%] of the entire county at any time, the members elected from the electoral district consisting of the entire county shall cease to be members of the Special Service District Council. Where the population of a portion of a Special Service District within a single electoral district falls below, or rises above, such fifty per cent [50%], the members shall cease to be, or shall become, respectively, a member of the Special Service District Council. Such Special Service District Council shall also include members who are appointed to fill vacancies in any district from which any Special District Council member was elected.

As a result of the 1971 amendment, the statute clearly provided for the

selection of members of the special service district councils by constituencies including substantial numbers of non-residents of the districts.[4] The ambiguity found in Bryant was removed.

6. As originally established, the Special Service District Councils had the following powers:

> The Special Service District Council of any Special Service District shall, with respect to such District have exclusive power by ordinance to approve its budget and make appropriations and tax levies required to be made under applicable law therefor; and that shall be its sole function. Acts 1969, ch. 173, § 405.

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4. Based upon the 1970 census the four at-large councilmen would qualify to serve on the special district councils under IC 18-4-1-2(m) as amended. The 1970 data is all that is currently available.

This Court in its opinion in Bryant declared the statutory limitations on the authority of the Special Service District Councils over legislation relating solely to the districts unconstitutional on the basis that it diluted the voting rights of the residents of the districts. The possibility of effective control of the districts by the City-County Council was the source of this problem. It was left to the City-County Council to deal with the problem. In Ordinance No. 48 that body set up a procedure allowing the Special Service District Councils legislative control of affairs within their purview and this was incorporated into the judgment in Bryant.

7. However § 405 was then amended by 1971, P.L. 258, § 6 tc read as follows:

> [18-4-4-5]. Special service district council.--The special service district council of any special service district shall,

> with respect to such district have exclusive power by ordinance to approve its budget and make appropriations and tax levies required to be made under the provisions of this article [18-4-1-1--18-4-24-25]. No special service district council shall have authority to originate or separately to adopt any other ordinance. However any ordinance adopted by the city-county council relating solely or exclusively to a special service district shall be suspended and of no effect until separately approved and concurred in by a majority of a special service district council when, but only when, the Constitution of the United States or the Constitution of the state of Indiana prohibits such ordinance taking effect without such approval.

The effect of this structure is that except for fiscal matters the special service district councils are again

able to be controlled by the 29 member city-county council which includes both the four at-large members and nine councilmen from districts outside the special service districts.[5]

8. Thus as of the date of the judgment entry in Bryant (March 6, 1970) this Court found no constitutional problems remaining in the structure or functioning of the special service districts and entered judgment for the defendants. As of that moment in time Uni-Gov was a functioning reality with the scope and membership of the Special Service District Councils set by statute and an interpretative ordinance. In the interim since March 6, 1970 this structure was changed by Acts 1971 P.L. 258 as set forth above and by the repeal of Ordinance 2-84 In sum, P.L. 258 did

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5. Ordinance No. 48 also responded to the Court's guidance as to the proper method for selection of a Public Safety Director.

the following: (1) it restored the at-large councilmen to the special service district councils. (P.L. 258 § 1 quoted supra at para. 5) and (2) it restricted the functions of these councils, (P.L. 258 § 6, (quoted supra at para. 6). The repeal of Ordinance 2-84 in 1976 only served to confirm these effects and constituted an approval of P.L. 258 by the defendants herein. The same repeal leaves the special district councils with only fiscal powers and no effective device to police the use of this power. Neither P.L. 258 nor the repeal of Ordinance 2-84 were shown to be a response to any change in the structure, functioning or area served by the two special service districts at issue. Neither P.L. 258 nor the repeal of Ordinance 2-84 was shown to contribute in any way to the creation or continuation of Uni-Gov. Thus, any Constitutional defects found therein will not be able to be justified by any progress towards

metropolitan consolidation. The services at issue were not consolidated in 1969 nor since.

II. The Parties

9. Plaintiffs Cantwell, Howard and Boyd are all citizens of the United States, registered voters in Marion County, Indiana, and residents of the Police and Fire Special Service Districts which are defined in IC 18-4-1-2(1) and IC 18-4-15.5-1(p), and as established by IC 18-4-12-6(b) and IC 18-4-12-34(b). Defendant William H. Hudnut, III, is and has been the Mayor of the City of Indianapolis and the Chief Executive Officer of the consolidated government for Indianapolis and Marion County, Indiana, since January 1, 1976. He was elected at the general election held on November 4, 1975, and is the successor to Richard G. Lugar in this action pursuant to F.R.C.P. 25(d). Defendants Tintera, Kimbell, Hart and Brinkman are the four "at-large"

members of the Indianapolis-Marion County City-Council elected at the general election held on November 4, 1975, each of whom represents a district consisting of the entire area of Marion County, pursuant to IC 18-4-3-6. Defendants Hart and Brinkman are successors in this action to former councilmen Roger Brown and John Ruckelshaus pursuant to F.R.C.P. 25(d).

III. The Nature of Special Service Districts

10. There can be no doubt that this case arises in the context of significant governmental units. Defendants have not argued differently. Among the most fundamental and ancient governmental services are police and fire protection.

11. The 1976 budget reveals that the Police and Fire Special Service District budgets including pensions exceeds $50 million of which about $31 million comes from local tax levies. No single item in the combined

county-wide budget equals this total. Only the Health and Hospital budget ($47 million) approaches it. Even Welfare ($35 million) and the combined budget for Roads and Transportation ($29.5 million) are smaller. The activities of the special districts are broad. By statute the Police and Fire Special Service Districts through the Director of Public Safety control property, purchase supplies, regulate the members of the police and fire forces, and fix compensation for employees. IC 18-4-12-5. The police force enjoys the fullness of the police powers. IC 18-4-12-16. A community relations office is a functional part of the police force. IC 18-4-12-28. Police and fire officers are provided with insurance and/or educational benefits. IC 18-4-12-30 and 31 and 18-4-12-50. Pension funds are provided. IC 18-4-12-33. In sum, the constitutional questions raised by the structuring of elections for and powers of the

special service districts arise in the context of municipal corporations which are large in size and pervasive in activity. These constitutional problems are not temporary. Despite the statutory provisions for the expansion of the special districts and their absorption by the consolidated government there has been no substantial change in the boundaries of the districts.

12. The Act as amended ties the special service districts into the county-wide administrative structure. Thus, (1) the Police and Fire Special Service Districts are under the authority of the Department of Public Safety, IC 18-4-12-1 et seq. (2) The same department is responsible for weights and measures, civil defense and the dog pound. IC 18-4-12-2. (3) The mayor appoints a Director of Public Safety subject to approval by a majority of the entire City-County Council. IC 18-4-3-4. (4) The budgets for the districts are prepared

by the Director. IC 18-4-12-11 and 18-4-12-37. (5) upon the approval or modification thereof by the special councils, the budget is subject to a veto by the mayor of the consolidated city-county (IC 18-4-5-2(c)) who is elected by the voters of the entire county, not just the special service districts (IC 18-4-3-1). (6) Beyond the limited legislative powers of the districts, their legislative affairs are controlled by the entire City-County Council including both the at-large councilmen as well as single-district councilmen from outside the districts.

13. Within Marion County there are 49 tax rates applied to 83 different geographical areas. No property taxes are (or could lawfully be) collected by the special service districts on property located outside these districts.

IV. The Department of Public Safety and Its Relation to the Special Service Districts

14. One of Uni-Gov's several executive departments is known as the "Department of Public Safety." The present Director of Public Safety is Murrill E. Lowry who has occupied that office since May 20, 1974. Lowry was appointed by Mayor William H. Hudnut, III for a one year term in January, 1976. The appointment was approved by the City-County Council. The at-large members have consistently participated in the voting on the subject of confirmation of the Public Safety Director by the Special Service District Councils since 1969. Certain minimal activities of the Department of Public Safety extend beyond the area of the Special Service Districts. That is to be expected since the Uni-Gov Act gives that Department, as opposed to the Special Districts, certain limited county-wide powers. See IC 18-4-12-2. The Districts however

have no right to serve non-residents unless statutorily allowed. IC 18-4-3-13. There was no showing of the existence or use of any such authority (if there be such) with the possible exception of the reference to contracts to provide fire service to non-resident properties. (Exhibit X at pp. 5-7). This is specifically permitted by IC 18-4-2-9 and 10. With this minor "exception" of no legal significance the record establishes only that (a) the Department of Public Safety has certain county-wide functions paid on that basis, (b) that the Department administers the geographically-limited Police and Fire Districts which have separate financial structures and (c) that the Department of Public Safety and the Indianapolis Police and Fire Districts cooperate with other police and fire agencies. This cooperation does not constitute anything unusual and is typical of ordinary governmental interaction. Such cooperation does not approach a merger of

district and county services. Since 1971 the districts have expanded only through marginal annexations of individual commercial sites, presumably due to quirks in the Indiana liquor laws. There has been no annexation through the broad population growth allowed by IC 18-4-12-8 and 18-4-12-36. The Special Service Districts, as opposed to the Department, have acted only within their districts. They tax only property located therein.

15. In Indiana voting rights are conferred according to the residence of the voter regardless of place of employment, property ownership or other factors. See Indiana Constitution Article 2, Section 2 and IC 3-1-16-9, 3-1-7-26 and 18-4-3-6. The provisions plaintiffs attack are those permitting all residents of Marion County to vote on the seating of at-large councilmen on the Special Service District Councils.

V. The Manner of Selecting the Special Service District Council Members

16. As of the 1970 census, 60.8% of the population of Marion County was located within the boundaries of the Police and Fire Special Service Districts. At no time since has the percentage of residents of the county within these districts exceeded that percentage.

17. The vote in the November 4, 1975 election within and without the Police Special Service District and the Fire Special Service District for councilmen-at-large for terms commencing January 2, 1976, was:

(a) Votes within the county as a whole:

	Vote	%		Vote	%
Beatty	111,946	48.3	Brinkman	119,970	51.7
Benedict	112,704	48.6	Hart	119,264	51.4
Bryant	112,576	48.5	Kimbell	119,575	51.5
Mahern	112,697	48.8	Tintera	118,100	51.2

(b) Votes within the Fire Special Service District:

	Vote	%		Vote	%
Beatty	69,387	58.7	Brinkman	48,787	41.3
Benedict	69,380	58.8	Hart	48,564	41.2
Bryant	69,898	59.0	Kimbell	48,603	41.0
Mahern	69,892	59.2	Tintera	48,082	40.8

(c) Votes within the Police Special Service District:

	Vote	%		Vote	%
Beatty	70,347	58.5	Brinkman	49,869	41.5
Benedict	70,818	58.8	Hart	49,626	41.2
Bryant	70,874	58.8	Kimbell	49,678	41.2
Mahern	70,886	59.0	Tintera	49,141	41.0

Thus while receiving only about 41% of the vote in the Special Service Districts, the four at-large councilmen defendants are given representation in their legislative bodies. The at-large candidates who received over 58% of the vote in the special service districts do not sit by virtue of having lost the other areas of the county by a larger ·rgin than they carried the special service districts.

18. No precise figures were made available, but it was stipulated and the Court finds that the ownership of commercial and industrial businesses, located within the Police and Fire Special Service Districts rests with individuals residing both within and outside of such districts, and within Marion County as well as outside of the county. Also, residents residing both within and outside of the Police and Fire Special Service Districts and within and outside of Marion County hold substantial interests in the form of stock in corporations which have

major investments in some of the many businesses located within such districts. In addition, there are many national corporations active in the districts and owning real property therein which have shareholders residing both within and outside of the districts and both within and also outside of Marion County. These corporations own substantial taxable property within the districts. Such business enterprises have employees who live in Marion County, both within and without such Special Service Districts, as well as outside of Marion County. However, stock in such corporations is also held by persons residing outside of Marion County. In sum, persons inside Marion County, but outside the districts hold no relationship to the districts any different from the relationship of persons living outside Marion County altogether in other parts of Indiana, or even outside Indiana.

[2] 19. The calculation of the extent of the dilution involved in the selection of at-large councilmen (if allowed to serve on the special district councils) is relatively simple. At least 39.2% of the county's population lives outside the special service district (Stipulation 7), thus since the franchise is based on residence (IC 18-4-3-6) one concludes that the vote of the average resident, including plaintiffs, suffers a substantial dilution through the votes of non-residents. Plaintiffs contend this is a 39% dilution and clearly impermissible. At oral argument the defendants suggested for the first time that the approximately 40% dilution in the election of the at-large councilmen must be reduced by multiplying it by 20% since the at-large make up only 20% (4 of 20) of the membership of the special service district councils. Since 40% X 20% = 8% the dilution thus becomes 8%. This argument has a surface appeal but misses the point. The denial of equal protection here is determined by the

dilution of plaintiffs' vote for the at-large councilmen through the vote of non-residents of the district. The extent of the dilution cannot depend upon the size of the legislative body where the at-large sit. A 50% dilution in a Congressional race would not be discounted because the elected Congressman is only one of 435 representatives chosen to serve all the people of this Country. In any event, the practical impact of the dilution is the ultimate test and it is clear that the very sizable vote cast by persons outside the district had the effect of reversing the selections of the residents of the district for their councils.

20. The conclusions expressed in Paragraph 6, supra as to the ability of the City-County Council to control the Special Service District Councils is buttressed by a review of the statutory and ordinance provisions relating to the City-County Council Committees. Each department of the county-wide government has a standing committee with powers as follows:

18-4-3-11. Committees of the council--Internal auditor.--The city-county council shall set up standing committees of not less than three [3] council members for each department, with full power to investigate the policies and expenditures of the department, with subpoena powers to require attendance before the committees, of employees of the consolidated city, any department thereof or any special taxing district or special service district, and with the right to examine any record or account of the city department or district. . . . (Emphasis added.)

21. By ordinance the Department of Public Safety has a Standing Committee (Indianapolis Code § 2-76(9)) but since March 1976 the Police and Fire Special Service District Councils have not enjoyed the powers of such a committee which they had enjoyed prior to the repeal of Indianapolis Code § 2-84. The provision of standing

committee powers to the Special Service District Councils had been incorporated in the judgment in Bryant v. Whitcomb but was repealed by action of the City-County Council as a whole taken during the pendency of this case. This repeal when taken together with IC 18-4-4-5 leaves the Special Service District Councils with little if any power to supervise the Police and Fire Department for which they supposedly serve as legislative bodies.[6]

22. This legislative structure of the Act includes obvious grants of power to non-residents of the district since they can control the district through their single-district councilmen as well as through their influence on the at-large councilmen. However, the property outside the district is not subject to taxation by the district. Taxation is limited to property solely within the districts. IC 18-4-5-8. Similarly, unless specially provided, the special service districts

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6. The Ordinances referred to herein are included in Appendix A hereto.

cannot provide service to non-residents. IC 18-4-3-13. (See also Para. 12 supra.)

V. The Constitutional Issues Raised by the Special Service District as Implemented by P.L. 258

23. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4) and has jurisdiction and venue of this suit since violations of 42 U.S.C. § 1983 and the Equal Protection Clause of the 14th Amendment are established. The Court has power to order relief pursuant to 28 U.S.C. §§ 2201 and 2202 on which this action was brought.

24. At the time of the implementation of Uni-Gov, substantial litigation was directed towards questioning the constitutionality of the Act. See Dortch v. Lugar (1971) 255 Ind. 545,

266 N.E.2d 25 and Bryant v. Whitcomb, supra.[7] Virtually all of the provisions of the Act withstood judicial scrutiny. However, in Bryant the Court noted several constitutional problems raised by the structure of the special service districts. These related to (1) the membership of the special service district councils, (2) the legislative powers of these councils and (3) the method of appointment of the public safety director. The same issues were raised by the plaintiffs herein. In light of the changed factual circumstances discussed herein the Court has decided these issues anew rather than relying on the principle of collateral estoppel.[8]

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7. It should be noted that in Dortch the Indiana Supreme Court did not rule on the issue of "unequal protection" in the context of the special service districts finding such issue to have been waived by appellant there. 255 Ind. at 575-6, 265 N.E.2d at 44.

8. See Bryant v. Whitcomb, S.D. Ind., 419 F. Supp. 1290, 1970.

[3] 25. This Court has recognized the need for "flexibility" or "experimentation" in local government. See e.g., Dusch v. Davis (1967) 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656; Sailors v. Board of Education (1966) 387 U.S. 105, 110-111, 87 S.Ct. 1549, 18 L.Ed.2d 650 and Avery v. Midland County (1968) 390 U.S. 474, 485, 88 S.Ct. 1114, 20 L.Ed.2d 45. Such a need can justify a dilution of voting power otherwise impermissible under the Equal Protection Clause.[9] But there is no showing that the legislation at issue here "may reasonably be said to advance the rational state policy" of providing flexibility in local government. See Mahan v. Howell (1973) 410 U.S. 315, 328, 93 S.Ct. 979, 987, 35 L.Ed.2d 320.

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9. There is reason to doubt whether this rationale could ever justify the nearly 40% dilution found here. However, in light of the evidence that issue need not be faced at this time.

26. This Court is compelled by Avery v. Midland County (1967) 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 and Hadley v. Junior College District (1970) 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 to conclude that the units of elected local government at issue here have such "general governmental powers" (Avery at 484-5, 88 S.Ct. 1114) to require an apportionment that "does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the . . . district." Hadley at 52, 90 S.Ct. at 793.[10] This result should obtain a fortiori when the dilution is in favor of a non-resident.

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10. The holding of Hadley is not changed by Salyer v. Tulare Lake Basin (1973) 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 which deals with an exception to the rule of Hadley.

27. That these districts have general governmental powers is obvious when one compares the facts here with those in Hadley. Here the powers of the special service district are fully as broad as those in Hadley. Police and fire services are normally the very heart of those local governments having "general responsibility". The members of the Special Service District Councils do not have duties "far removed from normal governmental activities" or disproportionately affecting only some citizens. Ibid. at 56, 90 S.Ct. at 795. As with education police and fire services have traditionally been governmental functions. Cf. Salyer 410 U.S. at 728-729, 93 S.Ct. 1224. See also Baker v. Regional School District No. 5 (2nd Cir. 1975) 520 F.2d 799, cert. den. 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369, where a district far more limited than that in Hadley was found to be within the rule of that case. The question of whether participation in

voting by non-residents constitutes an impermissible "dilution" in violation of the Equal Protection Clause has rarely arisen. There is no reported case other than this one where such unique "representation without taxation" has in fact occurred.

[4, 5] 28. The defendants argue in effect that the allowance of the at-large councilmen on the special district councils can be justified on a property-based franchise theory. This ignores the fact that the Constitution of the State of Indiana, Article 2, Section 2, specifically ties the right to vote to residence only, not property ownership or use of services. The qualifications for voting in municipal elections are limited to those set up by the Constitution and the general election laws. IC 3-1-16-9. These latter are similarly limited to residence. IC 3-1-7-26. Under the Uni-Gov Act it is this system of election which is provided. IC 18-4-3-6. At least in Indiana, defendants'

discussion of other factors is irrelevant. The statute makes residence, not property or other interests, the test; the issue is whether residence in Marion County outside the district is a permissible selection.

29. Defendants assert that Glisson v. Mayor and Councilmen of the Town of Savannah Beach, (5th Cir. 1965) 346 F.2d 135 is "in point". That case legitimized the use of a complicated franchise based under the statute on residence and/or property ownership. The Fifth Circuit approved this franchise in the context of a resort community which allows the vote to permanent residents of that city and to residents of the county where the city is located if they own property in the city.[11] There is no such two-tiered franchise here. Voting for

11. The rights of property owners who lived outside the county were not adjudicated because of a standing problem. Oliver v. Mayor et al., (5th Cir. 1965) 246 F.2d 133.

at-large councilmen here is based solely on residence anywhere in the county. IC 18-4-3-6. This franchise does not require that any voter live in the special service districts, work therein or own property therein. It does not deal with these questions at all. Thus, many of the voters in question here would not meet either of the tests approved in Glisson. In Glisson there was a "fit" between the franchise granted by the statute and the interests sought to be represented.[12] Here there is no such fit as to the theory defendants assert.

12. The extent of the fit was shown by evidence in that case indicating that 64% of the value of the real estate in the city was owned by non-residents of the city and that a "substantial majority" of the non-residents resided at Savannah Beach for one to four months a year. There is no such proof here, nor does it appear that there is much of a useful analogy between a beach resort and an urbanized state capital.

[6] 30. Defendants' also rely on Clark v. Town of Greenburgh (2d Cir. 1971) 436 F.2d 770. The "outsiders" there both paid some taxes and received some services from the governmental body at issue. 436 F.2d at 772. Here by statute the property of non-residents of the special service districts located outside the district cannot be taxed by the districts (IC 18-4-5-8) and the districts cannot provide services outside the districts except as provided by statute. IC 18-4-3-13. Even if services are provided to "outside" parts of Marion County by contract, they cannot be a basis for granting votes to broad numbers of other non-residents of the district. Moreover, to permit contracts to require the Courts to hold otherwise would be to induce a nation-wide rejection of inter-government cooperation for fear that it would permit, or require, a change in the franchise. It is this Indiana statutory arrangement that is before the Court, as it

was in Bryant. The New York structure is so different as to be irrelevant.

31. Rutledge v. State of Louisiana (W.D. La. 1971) 330 F. Supp. 336 is simlarly distinguished on the issues of services and taxes. There students from the city could attend city or parish schools. Here, police and fire services are geographically limited. There, the chief source of local revenue was local sales taxes apparently collected from the whole area of the parish. Here the main local revenue comes from property solely within the district. None comes from property without the district, and none comes from Marion County outside the district as such, i.e., as distinguished from any other part of the state outside the district. The other major sources of revenue are federal revenue sharing and Criminal Justice Revenues. Stip. Ex. I.(2), H.(2). The case is not controlling in any way.

[7] 32. The defendants made much of the non-local source of some district funds. This Court cannot conclude that because federal revenue sharing comes from all over the United States certain residents of Marion County get a vote for members of the Special Service District Councils. There is again no logical relationship between the franchise granted and the asserted justification.

[8] 33. It is the Court's decision that in light of the nature of the electorate which selects the at-large city-county councilmen there is a dilution of at least 39.2% of the vote of the plaintiffs in the selection of these officials if they are allowed to serve on the special service district councils. This is an obvious violation of the Equal Protection Clause and therefore IC 18-4-1-2(m) as amended must be declared unconstitutional pursuant to that Clause and 42 U.S.C. § 1983 since it allows this result unless the

defendants have shown that this dilution is "based on legitimate considerations incident to the effectuation of a rational state policy." Reynolds v. Sims (1964) 377 U.S. 533 at 579, 84 S.Ct. 1362 at 1391, 12 L.Ed.2d 506 and that given such a policy the dilution is within constitutionally tolerable limits. See, Mahan v. Howell (1973) 410 U.S. 315, 328, 93 S.Ct. 979, 35 L.Ed.2d 320. Defendants have wholly failed to meet this test.[13]

34. The only two justifications for the dilution suggested by defendants were the need for flexibility to achieve and maintain consolidation and the desire to give non-resident

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13. In light of the fact that this Act permits the unique phenomenon of "stranger voting", this Court is tempted to apply the more rigid "strict scrutiny" test but has refrained from doing so in light of defendants' obvious failure to meet even the lesser "rational basis" test.

property owners a voice in district affairs. Both theories fail. There is no showing that in 1969, let alone 1971, the provisions for excluding police and fire services from consolidation furthered the effort to get consolidated government. Even if this had been shown there still was no showing as to how this particular method for seating the at-large councilmen on the special district councils was a suitable device designed to aid the flexibility needed to make consolidated government acceptable. Perhaps more obvious is the point that the present system enacted in 1971 reversed the structure of a properly constituted council that was the effect of the original Uni-Gov Act as implemented in General Ordinance 48. These 1971 ordinances were not a part of a compromise or general plan and cannot claim any justification in the name of flexibility. Secondly, this statutory scheme was

plainly not designed to give any representation to those county residents living outside the districts but owning property in the district. The franchise portion of the Act speaks only of "residents" (IC 18-4-3-6) and not of property. Defendants' property-based rationale is clearly an after-the-fact effort to justify the result they seek and does not fit with the Indiana constitutional or statutory voting law.

35. As was pointed out in Mahan v. Howell, defendants cannot merely assert a rational basis for deviation from Equal Protection. They must go on and show that:

> "It can reasonably be said that the state policy urged [by them] to justify the divergences in the legislative reapportionment plan . . . is, indeed, furthered by the plan . . . and whether, if so justified, the divergences are also within

tolerable limits." 410 U.S. at 326, 93 S.Ct. at 986.

Defendants have failed to show that this structure obtains any needed flexibility, aids consolidation or gives non-resident property owners alone a special voice in district affairs. For all defendants have shown the interests of non-resident property owners who do not live in Marion County have been swallowed in a deluge of voting by Marion County residents from without the districts who own no property therein. This measure has failed to give any impetus to consolidation of the services at issue nor has it been shown to have led to any consolidation of any other service at any time. Thus, the method of selecting the members of the Special Service District Councils is lacking rational justification. Moreover, under no stretch of the imagination does this plan justify a 39.2% dilution. Such a dilution is 50% greater than that disallowed in

Swann v. Adams (1969) 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501. See Mahan, 410 U.S. at 328, 93 S.Ct. 979. In light of the size of this dilution as well as in light of its effect on the makeup of the district councils we must note the Supreme Court's caveat in Mahan:

> [a] State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality.

410 U.S. at 326, 93 S.Ct. at 986. To the extent that IC 18-4-1-2(m) allows the at-large councilmen to sit on the Special Service District Councils, it is hereby declared unconstitutional. Appropriate injunctive relief should be entered.

[9] 36. The heart of the constitutional wrong just found in IC 18-4-1-2(m) is in its effect, not its form. Thus the Court must pay

attention to any other device that allows the at-large councilmen an improper say in the affairs of the districts. IC 18-4-4-5 has this effect. It so limits the legislative powers of the Special Service District Councils as to make it impossible for them effectively to control the services for which they alone are allowed to approve budgets, appropriations and tax levies. With those three limited exceptions IC 18-4-4-5 throws the legislative powers of the districts into the hands of the entire City-County Council including the four at-large councilmen defendants. This Court views this allocation of control to the at-large councilmen to include the unconstitutional effect of giving power over district affairs to legislators who are elected by an improperly diluted vote. No constitutionally acceptable justification is found. Therefore, it is declared that IC 18-4-4-5 is unconstitutional insofar as it allows the at-large

councilmen any control over the affairs of the special service districts in their role as city-county councilmen and insofar as it prevents those councilmen properly representing plaintiffs on said special councils from effectively carrying out their legislative duties. Appropriate injunctive relief should be entered.

37. Plaintiffs have argued this case largely in the context of IC 18-4-1-2(m) dealing with the membership of the Special Service District Councils and IC 18-4-4-5, to the extent it purports to limit the powers of said councils. The Court's views as to the limitations on power as set forth in IC 18-4-4-5 have been presented supra in paragraph 36. In addition, the Court has judicially noticed several other statutory provisions dealing with powers of the Special Service District Councils. Several of these statutory provisions are susceptible of construction in conflict with the Court's overall

determination as to the proper membership of and powers of the Special Service District Councils. They are discussed separately.

(a) IC 18-4-4-4 refers to the City-County Council as the "primary legislative body" of the consolidated city and county. The same section gives the City-County Council "exclusive power to adopt budgets, to levy taxes or special taxes and to make appropriations required to be made for . . . its special taxing districts . . .". This provision could be construed to be in conflict with IC 18-4-4-5 giving the Special Service District Councils "exclusive power by ordinance to approve" their budgets, appropriations and tax levies.

(b) IC 18-4-5-5 deals with methods of exercising powers provided by the Act. It notes that "where no method is provided for the exercise of a power or to the extent the method prescribed is incomplete, it

may be established by ordinance of the city-county council" subject to certain limitations. This proviso could be read to give the defendants herein when acting together with the entire City-County Council, residual authority to control or overrule the actions of the Special Service District Councils.

(c) IC 18-4-4-4.5 relates to budget procedures and allows in some instances for the making of additional appropriations or transfers of funds between budgets by the City-County Council. Such proviso could be read in such a fashion as to permit the effective emasculation of the powers properly belonging to the Special Service District Councils.

(d) IC 18-4-3-11 provides inter alia that the City-County Council "shall also have the power to establish such other committees with such powers as it shall determine by ordinance." This proviso could be used by defendants in conjunction with the City-County Council in such a fashion

as to establish committees conflicting with the powers and responsibility of the Special Service District Councils.

[10]38. The Court could deal with the potential problems just raised through the device of declaratory judgment. It is clear that "a court may grant declaratory relief even though it chooses not to issue an injunction or mandamus . . . [but] a declaratory judgment can then be used as a predicate to further relief including an injunction." Powell v. McCormack (1969), 395 U.S. 486, 499, 89 S.Ct. 1944, 1952, 23 L.Ed.2d 491 (citations omitted). A reading of the four provisions just discussed makes it clear that they are susceptible of interpretation or application in such a manner as to circumvent this court's determinations as to the membership of the Special Service District Councils (IC 18-4-1-2(m) and the powers of said councils (IC 18-4-4-5). No such interpretations or applications have yet been made, however, and accordingly no relief is required at this time. The Court will presume

that the defendants intend to act in accordance with the requirements of the Constitution.

39. The necessity for injunctive relief as relates to IC 18-4-4-4, IC 18-4-5-5, IC 18-4-4-4.5 and IC 18-4-3-11 is not clear at this time. This is especially true in light of the fact that the Act does include several safeguards which should lead defendants herein away from any course of conduct which would require injunctive relief. Thus, for example, IC 18-4-5-2(c) provides that as to the Special Service District Councils the defendant mayor may not veto its actions to the extent that they constitute a resolution setting up rules for the internal management of the council, or a "resolution making an appointment provided to be made by the council under applicable law, or selecting the clerks, officers, employees, auditor or independent auditors of the council." In light of this consideration and out of respect for the independence of legislative bodies, this Court will not

attempt to define or establish the internal rules for functioning of the Police and Fire Special Service District Councils nor will it attempt to create a specific structure providing for the interaction between these councils and the City-County Council. Rather these legislative bodies are left to work this problem out among themselves consistent with the requirements of the Act as construed by this Court.

40. Plaintiffs' request that the at-large councilmen be excluded from voting on the confirmation of a Public Safety Director is denied on the authority of Sailors v. Board of Education (1966) 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650. The Public Safety Director is a nonlegislative officer within the meaning of that case unlike the at-large defendants. The method of his selection, unlike the method of electing the at-large councilmen, may well lead to some consolidation in county-wide affairs, such as Weights and Measures although it leads to no

county-wide consolidation of Police and Fire services.

VI. Relief

The appropriate relief is:

(a) Defendants Brinkman, Tintera, Kimbell and Hart and their successors as at-large councilmen should be permanently enjoined from serving or attempting to serve on the Police and Fire Special Service District Councils since IC 18-4-1-2(m) should be declared unconstitutional to the extent it allows them to so act.

(b) IC 18-4-4-5 should be declared unconstitutional insofar as it improperly limits the powers of the Special Service District Councils by allowing defendants Brinkman, Tintera, Kimbell and Hart and their successors as at-large councilmen control over the affairs of the special service districts within the sphere of action statutorily assigned to such districts. It should also be declared unconstitutional insofar as it assigns said

defendants any control over said districts denying to that extent the proper members of said Special Service District Councils the legislative powers necessary to carry out their mandate over the affairs entrusted to said districts. This declaration is not intended in any way to extend the powers of the special service districts beyond those granted in the Act but only to allow the Special District Councils to effectively execute the powers so granted. Defendants Brinkman, Tintera, Kimbell and Hart and their successors as at-large councilmen should be permanently enjoined from using or relying on IC 18-4-4-5 to control the affairs of said Special Service District Councils or to deny the proper members thereof the legislative powers necessary to carry out their mandate under the Act.

(c) Plaintiffs' request that defendants be enjoined from acting to approve the Public Safety Director should be denied.

(d) No relief should be granted as to IC 18-4-4-4, 18-4-5-5, 18-4-4-4.5 and 18-4-3-11.

Judgment to enter accordingly.

APPENDIX A

Sec. 2-76. Standing committees enumerated.

The standing committees of the city-county council shall be as follows:

(1) The administration committee;
(2) The community affairs committee;
(3) The county and townships committee;
(4) The economic development committee;
(5) The metropolitan development committee;
(6) The municipal corporations committee;
(7) The parks and recreation committee;
(8) The public safety and criminal justice committee;
(9) The public works committee;

(10) The transportation committee. (G.O. 293, 1971, § 2 (Rule 3, § 5; G.O. 53, 1975, § 1))

Sec. 2-77. Composition and chairmen of standing committees.

The standing committees of the city-county council shall consist of the number of members determined by the committee on committees, but shall not be less than three (3) members and shall have at least one (1) minority member. The president of the city-county council shall name the chairman of each standing committee from among the members named to the committee by the committee on committees. (G.O. 293, 1971, § 2 (Rule 3, § 6))

Sec. 2-78. President of the city-county council to be an ex officio member of the standing committees.

The president of the city-county council shall be an ex officio member of each standing committee of the city-county council and may participate in

its deliberations. The president shall not vote unless his vote would break a tie, and then only if he chooses to do so. (G.O. 293, 1971, § 2 (Rule 3, § 7))

Sec. 2-79. Functions of standing committees.

It shall be the duty of all standing committees of the city-county council to consider all proposals referred to it as provided in these rules. A standing committee may consider any other matter properly concerning departments or subject matter indicated by the name of the standing committee. Meetings of the standing committees shall be open to the public. A standing committee may hear such testimony or public comment as the committee deems proper. In lieu of separate hearings, standing committees may meet with the boards of corresponding city departments. (G.O. 293, 1971, § 2 (Rule 3, § 9))

Sec. 2-80. Attendance at meetings of standing committees by city-county council members who are not on the committee.

Any member of the city-county council shall be entitled to attend and participate in the discussions before any standing committee. The councilman introducing any proposal referred to a standing committee shall be a member of that committee while it is considering that proposal, but he shall not be entitled to vote. (G.O. 293, 1971, § 2 (Rule 3, § 9))

Sec. 2-81. Action and reports on proposals.

Any permanent or standing committee of the city-county council to which a proposal has been referred shall report to the city-county council upon each such proposal within forty-five (45) days of its referral, either with or without a recommendation, unless the president of the city-county council shall withdraw the proposal or reassign it. After any hearing by the

committee upon a proposal, the chairman of the committee shall submit a formal report of the committee's action, in writing, to the clerk. The report shall include any recommendations supported by a majority of the committee and may, upon request of any member of the city-county council, include a minority position. Any member of a committee may file a minority report. Such reports shall be filed in sufficient time to permit the clerk to circulate copies to all members of the city-county council prior to the next scheduled meeting of the city-county council. Copies of all committee reports shall remain on file in the clerk's office readily available to the press and public. (G.O. 293, 1971, § 2 (Rule 3, § 10); G.O. 70, 1972, § 1)

Sec. 2-82. Meetings of standing committees.

Standing committees of the city-county council shall establish at least one (1) regular meeting time and date each month. Other meetings of standing

committees shall be held at the call of the committee chairman upon not less than twenty-four (24) hours' actual notice to each member of the committee. All proposals referred to the committees shall be a proper item of business at each regular meeting, unless the proposal has been reported back to the city-county council. At any regular meeting of a committee, three (3) members present shall constitute a quorum for purposes of acting and reporting on any proposal assigned to the committee. (G.O. 293, 1971, § 2 (Rule 3, § 11); G.O. 31, 1975, § 1)

Sec. 2-83. Special committees.

Special committees of the city-county council may be formed by the president of the city-county council or by a vote of the majority of the members of the city-county council for any specific purpose proper for city-county council consideration. Special committees shall consist of an odd number of members and shall have at

least one (1) minority member. (G.O. 293, 1971, § 2 (Rule 3, § 12))

Sec. 2-84. Police special service district committee and fire special service district committee.

(a) There is hereby created a committee of the city-county council to be known as the "fire special service district committee" and a committee of the city-county council to be known as the "police special service district committee."

(b) Each member of the fire special service district council, as established pursuant to section 310 of chapter 173 of the Acts of 1969, or as shall be established pursuant to section 102(m) of chapter 173 of the Acts of 1969, shall be a member of the fire special service district committee of the city-county council.

(c) Each member of the police special service district council, as established pursuant to section 310 of chapter 173 of the Acts of 1969, or

as shall be established pursuant to section 102(m) of chapter 173 of the Acts of 1969, shall be a member of the police special service district committee of the city-county council.

(d) Each committee established by this section shall elect a chairman by majority vote of the committee and shall provide for its organization, procedures and meetings by rules to be adopted by the majority vote of the committee.

(e) Each committee established by this section shall have the authority and power of a standing committee of the city-county council as specified in section 311 of chapter 173 of the Acts of 1969, with regard to matters pertaining solely to their special service districts.

(f) Each committee established pursuant to this section, or a member thereof, shall further have the authority to propose ordinances on all legislative matters relating solely to their respective special service districts. Any ordinance pertaining

solely to a special service district shall be acted upon by the city-county council in accordance with its rules, provided that the members of the city-county council who are not members of the committee for the district affected by the ordinance shall not be eligible to debate or vote thereon, and any such ordinance receiving a majority vote of those eligible to vote shall be deemed to be duly passed and adopted.

(g) The appointment of a director of the department of public safety provided for in section 1203 of chapter 173 of the Acts of 1969 shall become effective, and shall be approved by the city-county council, only upon approval of the nominee by a majority vote of the members of the fire and police special service district committees established in this section. (G.O. 48, 1970, §§ 1-7)

Sec. 2-85. Investigating committees.

Investigating committees of the city-county council may be formed by resolution of the city-county council for any lawful purpose. The resolution establishing the committee shall specify the membership of the committee, the general nature of its investigation and the power to subpoena witnesses, if the power is granted. (G.O. 293, 1971, § 2 (Rule 3, § 13))

Secs. 2-86--2-90. Reserved.

RULE 4. PETITIONS, MEMORIALS, SPECIAL RESOLUTIONS AND COUNCIL RESOLUTIONS*

Sec. 2-91. Petitions.

Any petition directed to the city-county council, whether specifically authorized by law or not, shall be filed with the clerk and called to the attention of the city-county council by the clerk under the proper order

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*State law reference--Ordinances and resolutions of the city-county council, IC 1971, 18-4-5-2.

of business. If the petition is one specifically authorized by law, the president shall refer it to a proper committee. As to all other petitions, any motion for referral or other appropriate action shall be in order unless the motion requires action which is proper only by a general resolution or ordinance. In calling the petition to the attention of the city-county council, the clerk need not read the petition in full but shall report, fairly describing its contents. (G.O. 293, 1971, § 2 (Rule 4, § 1))